IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,

Petiitoners,

v.

NINE MILE - HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan; CARL B. BRANDENBURG, County Treasurer of Macomb County; GUY L. BROWN, County Clerk of Macomb County; BERT ENGELBRECHT, Drain Commissioner of Macomb County; SHERWOOD BENNETT, Comptroller of Macomb County; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF LAKE, a municipal corporation; TOWNSHIP OF WARREN, a municipal corporation; TOWNSHIP OF ERIN, a municipal corporation; CITY OF EAST DETROIT, a municipal corporation; VILLAGE OF CENTERLINE, a municipal corporation; ALFRED FOERSTER, CHRIST F. KAISER and HENRY JACOBS, Taxpayers, and ALEXANDER L. WALTENSPERGER and NELLIE WALTENSPERGER, Taxpayers,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

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CONCISE STATEMENT OF THE CASE

A Writ of Certiorari is sought to review an order of the Circuit Court of Appeals, 119 Fed. (2d) 157, reversing a District Court judgment (R. 220-233), which judgment was

entered after overruling exceptions of petitioners (R. 211-216) and respondents (R. 204-211) to a report of a Special Master (R. 148-203). We find it necessary to point out inaccuracies and omissions in opposing counsel's statement of the case. Petitioners excepted to the Master's Report on the ground that the primary purpose of the project was drainage and that the project was a legal project under the applicable laws of the State of Michigan (R. 212-213) and that petitioners were entitled to the independent judgment of the Federal Court as to the character of the project without regard to the prior adjudication of the Michigan Court (R. 214). Not only had the Michigan Supreme Court decreed the entire proceedings and the project to be illegal and void (R. 25), but, as appears from the records in this case, the Special Master in his report, the District Judge in overruling petitioners' exceptions, and the Circuit Court of Appeals in its opinion determined the proceedings and the project to be illegal under Michigan law. The Special Master and the District Court held that petitioners were not bound by the decision of the Michigan Supreme Court in the case of the *Township of Lake v. Millar,* 257 Mich. 135, where these identical proceedings were decreed illegal and void by the state court because bondholders were not named as party plaintiffs or defendants in that case, and further that even though the project and the proceedings were illegal under Michigan law the respondents were estopped by the recitals in the bonds to deny their validity. The Circuit Court of Appeals reversed the District Court on its findings as to the legal effect of the Township of Lake case and further held that the respondents were not estopped to deny the validity of the bonds because the Federal Court was bound to follow the state law, and that under the state law the proceedings, of which the bonds are a part, were void because of lack of jurisdiction in the Drain Commissioner to do what he attempted to do.

On page 4 petitioners state: "Objection to the payment of the bonds and levy of taxes is based upon a claim that the improvement was designed and built with the intention that it would serve the dual purpose of removing surface water and sanitary sewage, and because of this underlying purpose the Drain Commissioner lacked jurisdiction." The erroneous statement that objection to the payment of the bonds or the defense of the case is based upon a claim that the improvement was designed for a dual purpose, is argumentative and completely disregards the tests of legality consistently applied by the state court and properly applied by the lower court in its opinion (R. 975-988).

The suit was defended on the grounds, first, that the petitioners are bound by the decision and the decree of the Michigan Supreme Court in the case of *Township of Lake v. Millar,* the decision being reported in 257 Mich. 135 and the decree attached to plaintiffs' complaint (R. 25), where this identical project and the proceedings in connection therewith, of which the bonds are a part, are found and decreed to be illegal and void; and second, that even if the petitioners are not bound by said state decision, the project as conceived and constructed was, under the decisions of the state court, an illegal sewer and not a drain or, at best, it was a combined sewer the primary purpose of which was not to furnish drainage facilities as required by the state law but to furnish illegal sewage facilities; that the Drain Commissioner was without jurisdiction, his illegal acts being mere usurpations of authority and, therefore, under the decisions of the state court the recitals in the bonds do not estop respondents from defending against the bondholders upon the ground of the illegality of the project and of the proceedings of which the bonds are a part. The bonds were signed by the Drain Commissioner and pledged the faith and credit of the Drainage District only and were

certified to by the County Clerk. The respondents are: The Nine Hile-Halfway Drain District, the County Treasurer, Clerk, Drain Commissioner, Comptroller and Board of Supervisors, the Townships of Lake, Warren and Erin, the Cities of East Detroit and Centerline and certain individual Taxpayers, and the suit was further defended on the grounds that even if the Drainage District should be held liable on the bonds that respondents other than the Drain Commissioner were not parties to the recitals in the bonds and could not, under Michigan law, be required to pay for an illegal project.

The statement appearing on page 3 of the petition—"A review of any question involving any step in the proceedings is provided by certiorari, * * *" is not complete without a reference to the state court's interpretation of this statute on this and other identical projects and proceedings. A Circuit Judge from an adjoining circuit of Wayne County, Michigan, was called in to hear the Township of Lake case and sustained the contention of counsel for the Drain Commissioner and the County on the technical ground that the Drain Commissioner and others were estopped to deny the validity of the project and the proceedings because of the failure to take the state statutory certiorari proceedings referred to by petitioners. On appeal the Michigan Supreme Court reversed the holdings of the Circuit Court and its findings as to the application of the state certiorari statute on the ground that the proceedings were void because the Drain Commissioner was without jurisdiction, and in such case no estoppel arose against plaintiffs for failure to take the Michigan statutory certiorari proceedings. This holding of the Michigan Supreme Court as to the Michigan certiorari statute referred to by petitioners has been consistently followed, as will more fully appear in respondents' argument.

Petitioners' reference to Act 316 of the Public Acts of 1923, as amended by Section 5, Chapter XVII, Act No. 74 of the Public Acts of 1925, appearing on page 4 of their Petition, fails to include the statement that the State Supreme Court gave full consideration to this provision of the law as it was there presented by special counsel for the bondholders when it held the proceedings illegal and void in the Township of Lake case. (See Vol. 2360 of Michigan Supreme Court Records & Briefs, pp. 26-31). An examination of this section in conjunction with the history of these particular proceedings follows in our argument.

On page 6 petitioners include a portion of the history of the proceedings which makes no reference to the plans and specifications or to the advertisement for bids or the issuance of the bonds which are a part of the proceedings. The advertisement for bids for bonds does, however, appear on page 494 of the Record as a part of the proceedings in the similar companion case, *Petitioners v. Centerline Relief Drain District, et al.,* this Court docket No. 290. Petitioners introduced in evidence Exhibit 1, the plan and profile of the Nine Mile Drain (R. 289) and relied on this exhibit to determine the character of the project (R. 354). Petitioners' statement that the proceedings conform strictly to the Drain Law is erroneous, and the most that can be said is that, as was stated in the statement of the case in the lower court and not objected to by counsel for petitioners, the proceedings in form followed the Drain Law and finally culminated in the levying of assessments, the issuance of bonds and the construction of the project.

Petitioners' statement on page 10 that the lower court refused to consider the case of *Detroit Trust Co. v. Dingman,* 291 Mich. 170, is erroneous, as clearly appears from record page 980 of the lower court's opinion, and so argumentative that we leave the answer thereto to our argument and objections to the Petition.

At the time the project was constructed, there was legal authority for the use of County drains for sewage disposal by municipalities, but there was no statute authorizing the use of County drains for sewage disposal by individuals as was being done at the time this project was constructed and as has been done since the construction thereof. On September 3, 1913, the Attorney General of the State of Michigan, gave an opinion to the Drain Commissioner of Macomb County, introduced in evidence as Exhibit A-3, to the effect that "if private individuals or corporations are using a County drain for sewage disposal without authority, it would be the duty of the County Drain Commissioner to put a stop to such unlawful use" (R. 804, 805).

By agreement of counsel, the Master accompanied by representatives of counsel of record, made a personal inspection of the project and the assessment district. The sewage disposal plant was placed in operation for the purpose of this inspection and a conspicuous amount of sewage was evident both in the disposal plant itself and the adjoining tanks. A personal inspection was made of the outlets of the conduits and these disclosed pronounced evidence of raw domestic sewage. Likewise, an examination was made of the interior of the conduits by entry through manholes and here again the specimen of sewage was such as is found in an urban area.

At the time the proceedings were undertaken and the project constructed the population of the assessment district was in excess of 11,000 (R. 497) and included the City of East Detroit, part of the Villages of St. Clair Shores and Centerline and a settled portion of Warren Township. The entire area, including the existing municipalities, was without sanitary sewage facilities; outhouses were numerous within the municipalities and sewage in the open ditches created a public nuisance (R. 425, 497, 750). The Master's

findings as to the history of the project adjacent to the Detroit area where similar projects had been constructed under the sewer law of the State of Michigan, and the character and manner of construction, is substantially correct and rather than repeat the same we refer to pages 155-163 of the Record.

The project in this case was designed and built so that laterals could follow existing or projected streets or alleys to furnish sewage facilities, and it was conceded by the testimony of all the witnesses that the main trunk sewer could be of no benefit to lot owners other than those immediately adjacent thereto without the construction of laterals (R. 405-407, 415, 417, 510, 511, 619, 802).

This case is one of three cases which involve similar projects and similar legal issues, the testimony of which was taken simultaneously with the testimony in this case, upon which the Master filed a combined report and during the trial of which some exhibits were used in common. Petitions for certiorari have been filed in all three cases, the other two cases being by the same petitioners and in one the Martin Drain and Branches Drain District, et al., respondents, this Court docket No. 289, and in the other, Centerline Relief Drain District, et al., respondents, this Court docket No. 290. It was stipulated by counsel in the lower court (R. 242, 244, 245, 246) that any of the exhibits or testimony in these cases, this Court docket Nos. 289 or 290, would be considered a part of the record in this case and would be referred to in the arguments and briefs.

The lower court settled purely local controversies involving the application of the Michigan decisions to determine the jurisdiction of the Drain Commissioner and the validity of proceedings by the Drain Commissioner which purport to be under Act 316 of the Public Acts of 1923, as amended (a portion of which is attached as an appendix to

the Petition). On the trial of the case petitioners produced an engineer as a witness and introduced in evidence the plan and profile of the project, Exihibit 1, but could not locate the contracts and specifications (R. 288, 289). This witness testified that in his opinion the project was a legal drain, and based his opinion solely on Exhibit 1 and the knowledge of the terrain (R. 354). The testimony of the designing and other engineers was that the project and proceedings were designed primarily to furnish sewage facilities (R. 440, 486, 487, 495-497, 502, 511, 512, 529, 530, 543, 547, 548, 569, 570, 577, 590, 591, 605, 618, 620, 625, 626, 630, 668, 751, 756, 761).

We have recited only sufficient facts to show some of the inaccuracies and omissions of petitioners' statement of the case. These more fully appear in our Argument (pages 9 to 63) and we will not repeat them here.

ARGUMENT

PRELIMINARY STATEMENT

We respectfully submit that the reasons relied upon by petitioners for the allowance of the Writ of Certiorari do not entitle them to the Writ.

1. Petitioners state as their first reason for the allowance of the Writ that due process is denied petitioners by the decision of the Circuit Court of Appeals holding that the decrees in taxpayers' suits in the state courts are *res judicata.* This question was fully briefed and argued by both sides in the Circuit Court of Appeals. This is not a case where a state statute or a state court decision is claimed to have deprived bondholders of their right to due process under the Federal Constitution, but a case where petitioners claim that they have been denied due process of law by the decision of the Federal Circuit Court of Appeals, which held that the bondholders have had their day in court and that the state court decisions are *res judicata.*

The discretion of this Court in granting Writs of Certiorari is exercised sparingly and with caution. *Amer. Constr. Co. v. Jacksonville T. & K. W. Ry. Co.,* 148 U. S. 372, 37 L. Ed. 486; *In re Woods,* 143 U. S. 202, 36 L. Ed. 125. We respectfully submit that the petition for certiorari in this case amounts to a request for a rehearing of the issues already decided by the Circuit Court of Appeals and that petitioners are not entitled to such rehearing. In *5 Cyc. of Fed. Procedure,* paragraph 2638, it is stated:

> "It is clear that the writ will not issue merely to give the defeated party in the Circuit Court of Appeals another hearing nor to review evidence on mere questions of fact." *Magnum Import Co. v. Coty,* 262 U. S. 159, 67 L. Ed. 922.

2. Petitioners state as their second reason for the allowance of the Writ that the Circuit Court of Appeals did not decide issues in accordance with local law. Petitioners themselves admit on page 43 of their Brief that this reason is not a proper one for the allowance of the Writ. Suffice it to say, therefore, that the issues of local law decided by the Circuit Court of Appeals were all fully briefed and argued by petitioners in the lower court and that said issues were decided by the Circuit Court of Appeals in accordance with local law. It now appears that petitioners are seeking a rehearing upon the decision of the Circuit Court of Appeals pertaining to issues of local law, and this rehearing they are not entitled to. *Magnum Import Co. v. Coty, supra.* It has been repeatedly held that on a question of fact the Supreme Court will accept the concurrent findings of the District Court and the Circuit Court of Appeals when supported by substantial evidence. *Kellogg v. Hicks,* 285 U. S. 502, 76 L. Ed. 903; *Texas and N. O. R. Co. v. Brotherhood of Ry. and Steamship Clerks,* 281 U. S. 548, 74 L. Ed. 1034, and *Virginia Ry. Co. v. System Federation No. 40,* 300 U. S. 515, 81 L. Ed. 789.

3. The Circuit Court of Appeals has not decided the question of the power of Federal Courts to restrain action to enforce actions of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, in *Fetzer v. Johnson,* 15 Fed. (2d) 145, or in conflict with the decision of this Court in *Chase National Bank v. City of Norwalk,* 291 U. S. 431. In the case at bar the Circuit Court of Appeals did not decide that if the bonds were for any reason held to be valid that the injunction of the state courts enjoining the collection of taxes could not be overridden. The Circuit Court of Appeals made no finding upon this question one way or the other, as may be readily seen from an examination of the Opinion

of the Circuit Court of Appeals. Moreover, the contention of petitioners on this point is controlled by the decisions in the case of *Erie Rd. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, and in *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, 82 L. Ed. 1290, in which latter case this Court held:

> "As to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States, as the conflict may be merely corollary to a permissible difference of opinion in the state courts."

I.

PETITIONER'S RIGHT TO RECOVERY IS FORECLOSED BY THE DECISION AND DECREE OF THE MICHIGAN SUPREME COURT IN THE CASE OF TOWNSHIP OF LAKE v. MILLAR

In the case of *Township of Lake v. Millar,* 257 Mich. 135, the Michigan Supreme Court in passing upon the same proceedings now under consideration by this Court, held as follows:

> "The question is presented whether a petition for a drain confers jurisdiction upon the drain commissioner to build a sewer, whether a petition to the drain commissioner to do something within the scope of his authority confers jurisdiction upon him to do something wholly without the scope of his authority; whether a petition to do something he has a right to do confers jurisdiction upon him to do something which he has no right to do; whether upon filing a petition for a drain which he has a right to build, the commissioner may lay out and construct a sewer which he has no right to build? A drain commissioner may not, by mere assumption of authority, legally do that which he has no authority to do. If, upon a petition to do

what he has a right to do, he may do what he has no right to do, the extent of his authority is measured by his own acts and conduct and not by law. The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority. The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but AN ENTIRE WANT OF JURISDICTION MAY BE TAKEN ADVANTAGE OF AT ANY TIME. The drain commission had no jurisdiction to construct a sewer any more than to construct a Covert road. No one will contend that if the drain commissioner, when the petition for a drain was filed with him, had laid out an assessment district, established and constructed a Covert road, the plaintiffs would have been without remedy. The same legal question is here presented. THE PROCEEDINGS ARE VOID FOR WANT OF JURISDICTION." (Emphasis supplied.)

The decree entered pursuant to the opinion provided:

"2. That all proceedings and actions heretofore had and taken by the defendants as set forth in the amended bill of complaint filed in this cause, relative to the survey, location, establishment and construction of the Nine Mile-Halfway Drain, the extension of the outlet thereof, and disposal plant, and all apportionments and assessments made thereon, against the plaintiffs and the lands of said plaintiffs, are decreed to be illegal, unlawful, null and void, and of no effect whatsoever, and said apportionments and assessments be and are hereby cancelled, vacated and set aside, and the said lands of plaintiffs be and are hereby forever discharged of and from the apparent lien thereof.

"3. That the defendant Thomas F. Simms, treasurer of Macomb County, Michigan, and his

> successors in office, be and are hereby perpetually enjoined and restrained from collecting or attempting to collect any of the assessments levied against the said respective plaintiffs, or the respective parcels of land taxed or assessed against them in the tax roll for the location, establishment and construction of said Nine Mile-Halfway Drain and disposal plant, and from selling or attempting to sell any of the property of said plaintiffs for nonpayment of the said assessments. No costs will be awarded herein."

With reference to the binding effect of this decision on the Federal Courts the Circuit Court of Appeals properly held that the decrees in the State cases "construing as they do the Michigan County Drain Law, are binding upon this Court. Rulings of State Courts construing state statutes were binding upon Federal Courts prior to the announcement of *Erie Railroad Company v. Tompkins,* 304 U. S. 64. Certainly since that decision the Federal Courts are governed by state law to a greater extent than formerly. * * *"

The present contention of Petitioners is that the bondholders are deprived of due process by the decision of the Circuit Court of Appeals holding that the decision of the Michigan Supreme Court in the case of *Township of Lake v. Millar* is *res judicata* of the rights of the bondholders.

The legal issue involved has been clarified by *Kersh Lake Drainage District, et al., v. A. J. Johnson,* 309 U. S. 485, and by the decision of the Circuit Court of Appeals in this case. The important point decided in the Kersh Lake case is that under very similar circumstances and statutes it has been held by this Court that the Drain Commissioners do represent the bondholders. In the Kersh Lake case the Court stated:

"As stated by the Supreme Court of Arkansas, the general jurisdiction of the Lincoln Chancery Court, under the State law, to render the 1931 and 1932 decrees is 'acknowledged,' and this determination by the State's highest court is binding upon us. However, petitioners' argument is that these decrees were void because certificate holders were not made parties in and had no notice of the chancery proceedings. Therefore, they contend that in giving effect to the State court decrees and treating them as *res judicata* in the present proceeding the court below deprived certificate holders of their property without due process of law in violation of the Fourteenth Amendment. Petitioners also add the contention that the 1932 State court decree was 'collusive as a matter of law.'

"Although the Drainage District was not in terms legislatively declared to be a corporation, its powers and limitations were similar to those of corporations and its Commissioners were comparable to corporate directors. Among the duties of the Commissioners—as provided by the very statute upon which the certificates involved here rest—were those of protecting and enforcing creditors' rights on obligations issued by the District. And the Commissioners in 1931 and 1932 litigated with the landowners the disputed question of proportionate amounts of the taxes due the District by virtue of drainage benefits received by the particular tracts here in question.

* * * * *

"These certificate holders were not entitled to be made parties in the Lincoln Chancery proceedings just as in practice creditors of a corporation are not, unless otherwise provided by statute, made parties in a suit between a stockholder and the corporation to determine liability on a stock subscription, between the corporation and a third person to recover corporate assets, or in a suit

> brought against the corporation by creditors, stockholders or officers. It has been held that bondholders are not necessary parties to and are bound by the decree—even if adverse to their interests—in litigation wherein an indenture trustee under a bond issue is a party and exercises in good faith and without neglect his contractual authority to represent and assert the lien securing the issue. And so are these petitioners bound by the decrees in the Chancery suit in which the Commissioners as parties appropriately asserted the lien for benefit of certificate holders—unless there was fraud or collusion.
>
> "It is sufficient to state as to this contention that the issues of fraud and collusion raise no questions which the Supreme Court of Arkansas was not competent finally to decide."

In connection with the language used in the Kersh Lake case by this court it will be noted that the Circuit Court of Appeals held that the drain district in this case is a corporation.

It is apparent that a duty similar to that imposed on the Arkansas Drain Commissioners is imposed upon the Drain Commissioners in Michigan where Section 4936 of the Compiled Laws of Michigan for 1929 provides as follows:

> "Commissioner party to suit. Sec. 14. In any suit brought to set aside any drain tax, or in any way attacking the legality of any drain proceedings, the Commissioner shall be made a party to said suit."

The Michigan Supreme Court has definitely held that the drain commissioner stands as a representative of those who are interested in the drain and collection of the tax, in *Godkin v. Rutterbush,* 147 Mich. 116, where it is stated with reference to the statutory provision quoted above:

> "The obvious reason for the enactment of this provision was that the drain commissioner in a peculiar sense stands as a representative of those who are interested in the drain and in the collection of the tax. The purpose of the statute was to afford to the drain commissioner the opportunity to be heard in the proceeding."

On this point the Circuit Court of Appeals held:

> "There is no essential difference between the statutes of Arkansas and Michigan dealing with this situation. Neither statute provides that the creditors or bondholders shall be made party, the Michigan statute requiring only that in any suit brought to set aside any drain tax or in any way attacking the legality of any drain proceedings, the drain commissioner shall be joined as party to the suit (Section 14, c. 10, Act 316, Michigan Public Acts, 1923). In the Kersh Lake case, *supra*, the Supreme Court pointed out that the Arkansas statute contemplated 'that the commissioners should represent the collective and corporate interests of the district in litigation between the district and a landowner involving matters personal to the landowner.' The Supreme Court of Michigan has held that 'The drain commissioner in a peculiar sense stands as the representative of those who are interested in the drain and in the collection of the tax.' *Godkin v. Rutterbush*, 147 Mich. 116. This holding makes the Kersh Lake case squarely applicable to the instant case."

We respectfully submit that a proper interpretation of the recent United States Supreme Court decision in the Kersh Lake Drainage District case settles all the issues in controversy here and was authority for the holding of the Circuit Court of Appeals that the decision of the Michigan Supreme Court with reference to this particular project is *res judicata* as to the petitioners herein.

(a) Bondholders' Contention That They Had No Notice of the Proceedings in the State Court Is Not Tenable.

This contention was overruled by the Circuit Court of Appeals in this case and a similar contention was overruled by this Court in the Kersh Lake case. In the Kersh Lake case this Court held that the bondholders were not entitled to be made parties and that they were bound by the Decree of the State Court, even though they received no personal notice of the action in the State Court, because their interests were represented by the Drain Commissioner.

However, the bondholders actually did have notice of the proceedings in the case of *Township of Lake v. Millar* because while they did not appear as parties to the suit, the cause was briefed and argued by Mr. John Spaulding (R. 264-268) who gave the legal opinion on the bonds in the first instance, and his law firm of Miller, Canfield, Paddock & Stone of the adjoining County of Wayne, Michigan, appear on the briefs of the Drain Commissioner of Macomb County as of Counsel.

The case of *Wuchter v. Pizzutti,* 276 U. S. 13, is not applicable to the case at bar. The Wuchter case involves the validity of a statute of New Jersey providing for service of process on non-residents of the State in suits for injury by the negligent operation of automobiles on its highways. The distinguishing feature is that under the statute considered in the Wuchter case the service is made by leaving the Summons with the Secretary of State. The Secretary of State is not made a party to the suit and in no sense stands as the representative of the non-resident motorist at the trial of the cause, so that obviously a means of notifying the non-resident is required; but in the present situation the Drain Commissioner is made a party to the suit and does stand as a representative of the bondholders.

(b) It Is Not the Duty of This Court to Grant Certiorari.

Petitioners ask for certiorari on the allegation that they have been denied due process of law by the decision of the Circuit Court of Appeals. The Circuit Court of Appeals held that the bondholders are bound by the decision of the State Court in an action by taxpayers against the Drain Commissioner, et al., attacking the validity of the drain proceedings and seeking a permanent injunction against the levy and collection of taxes, when the interests of the bondholders and others interested in the drain and the collection of the tax are represented by the Drain Commissioner.

Petitioners are not entitled to certiorari based upon the allegations in their Petition, because—

(a) The question of the binding effect of the State Court decision on the bondholders has already been fully briefed, argued and decided by three competent Judges of the Sixth Circuit Court of Appeals, and it was held by the said Circuit Court of Appeals that under the authority of the Kersh Lake case, *supra,* decided by this Court, that the decision of the Michigan Supreme Court in the case of *Township of Lake v. Millar* is binding upon the petitioners herein. The Circuit Court of Appeals further stated that "there is no essential difference between the statutes of Arkansas (determinative of the Kersh Lake case) and Michigan dealing with this situation." Under the above circumstances there is no duty upon this Court to review the decision of the Circuit Court of Appeals which has already passed upon the contention now urged before this Court. *Magnum Import Co. v. Coty,* 262 U. S. 159, 67 L. Ed. 922.

(b) Moreover, the case of *Hansberry v. Lee,* 311 U. S. 32, is not applicable here because in that case it was the

decision of the State Court which, it was claimed, was in violation of the due process clause of the Federal Constitution, and the question of whether the said State Court decision violated the due process clause of the Federal Constitution had not been passed upon by a Federal Court and under those circumstances this Court very properly granted certiorari.

(c) The question of whether or not the lower court erred in holding that Petitioners are bound by the decision of the Supreme Court of the State of Michigan need not be decided by this Court because the decision of the Circuit Court of Appeals would have been the same regardless of its holding on the *res judicata* question.

The first point decided by the Circuit Court of Appeals was that the recitals in the bonds do not estop the taxpayers, townships or municipalities or the County from raising the defense that the particular projects were constructed wholly without authority, and that the projects and all the proceedings thereunder, including the bonds which were issued as a part of the proceedings, are void. This point was decided on the well known principle of law that there can be no estoppel by recitals against parties who did not join in the recitals, and in this case the recitals were executed only by the Drain Commissioner on behalf of the Drainage District so that no party, with the exception of the Drainage District, could possibly have been bound by the said recitals.

The second point decided by the Circuit Court of Appeals was that not even the Drain Districts were estopped by the recitals in the bonds because it is the law of Michigan that where the Drain Commissioner is completely lacking in jurisdiction the proceedings are illegal and void and bonds issued to defray the expense of such proceedings are void in the hands of innocent holders since there can

be no estoppel when there is a complete lack of jurisdiction. The Circuit Court of Appeals further held that the Federal Courts are bound to follow the law of Michigan under the rule stated in *Erie Railroad Co. v. Tompkins (supra).*

So it is clear that regardless of the decision that the Circuit Court of Appeals came to on the question of whether the bondholders were represented by the Drain Commissioner and were bound by the Michigan decisions on these projects, the decision would still be that the Federal Courts must follow the Michigan decisions holding that where the Drain Commissioner built a sewer he was without jurisdiction, that the proceedings were void, that the taxpayers, townships, municipalities, counties and Drain Districts were not estopped by the recitals in the bonds and that where there is a total lack of power, the bonds issued as a part of the proceedings are void.

We, therefore, respectfully submit that this Court should not grant certiorari to review a question which has already been fully considered and decided against Petitioners by the Circuit Court of Appeals and which, even if it were decided in favor of Petitioners, would not change the decision of the Circuit Court of Appeals in its holding that the bonds are void.

II.

THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, HAS NOT DECIDED IMPORTANT QUESTIONS OF LOCAL LAW PROBABLY IN CONFLICT WITH THE LOCAL STATUTES AND DECISIONS OF THE STATE OF MICHIGAN, AS CONTENDED BY PETITIONERS IN THE SECOND REASON GIVEN FOR ALLOWANCE OF THE WRIT

At the outset of our reply to the second section of petitioners' Brief, we wish to point out that the cases of *New England Mutual Life Insurance Company v. Mitchell,* 118 Fed. (2d) 414, and *American Surety Company v. Baldwin,* 287 U. S. 156, cited on pages 24 and 25 of petitioners' Brief, are not applicable to the facts in this case. The quotation from the New England Mutual Life Insurance Company case applies to a situation where a federal court is called upon to make a decision on a local matter "where there has been no decision on the precise question" by the state court, but the Michigan courts have repeatedly passed upon the questions now before this Court. On the question of the validity of the bonds the Circuit Court of Appeals held:

> "While in the Michigan cases involving these projects the bondholders were not joined as parties, it is the law of Michigan that where the projects are illegal not from mere procedural deficiency, but from total lack of authority to construct the projects, bonds issued to defray the expense of such projects are void in the hands of innocent holders, and this law we follow."

The American Surety Company case, *supra,* cited by petitioners, is not applicable here because the facts are different. In that case the United States Supreme Court withheld action on a petition for a writ of certiorari pend-

ing the action of the Supreme Court of Idaho with reference to actions involving the same parties and the same subject matter. It appears that if the Idaho Supreme Court had granted the relief sought by the American Surety Company there would have been no need for the United States Supreme Court to issue the writ of certiorari, so in that case this Court properly withheld action upon the petition for the issuance of the writ until the American Surety Company had exhausted its remedy in the state court.

Petitioners' contention that this Court should withhold action upon the Petition for a Writ of Certiorari pending the outcome of the case of *City of Highland Park v. Clark,* No. 41,690 Michigan Supreme Court, is answered on pages 59 to 63 of this Brief.

(a) THE CIRCUIT COURT OF APPEALS DID NOT REJECT LOCAL INTERPRETATIONS OF THE DRAIN STATUTE AS TO THE CHARACTER OF THE IMPROVEMENT THAT THE DRAIN COMMISSIONER WAS AUTHORIZED TO CONSTRUCT.

Our reply to paragraph (a) of the second reason given by petitioners divides itself into two points:

1. **That even if it be assumed that the decision of the Michigan Supreme Court decreeing the project to be illegal is not res judicata as to the petitioners, on the record of this case the project was illegal and the proceedings, including the bonds, were void because the project was conceived and constructed not with the primary purpose of furnishing drainage facilities but with the dominant purpose of furnishing sewage facilities.**

The Circuit Court of Appeals properly held that the findings of the Special Master, as confirmed by the District Court, determining the Nine Mile project and the proceedings pertaining thereto to be illegal and void, should not be overruled unless clearly erroneous.

Rule 53, Rules of Civil Procedure, Subdivision (e) (2),
Atherton v. Anderson (C. C. A. 6th), 86 Fed. (2d) 518.

It has been repeatedly held that on a question of fact the United States Supreme Court will accept the concurrent findings of the District Court and the Circuit Court of Appeals supported by substantial evidence.

Kellogg v. Hicks, 285 U. S. 502, 76 L. Ed. 903;
Texas and N. O. R. Co. v. Brotherhood of Railroad and Steamship Clerks, 281 U. S. 548, 74 L. Ed. 1934;
Va. Ry. Co. v. System Federation No. 40, 300 U. S. 515, 81 L. Ed. 789.

The decisions of this Court following *Erie Railroad Company v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, make it unnecessary for Respondents to enlarge upon the established law that the Federal Courts must follow the decisions of the State Court in interpreting the drainage statute and the limits of the jurisdiction of the Drain Commissioner. The Circuit Court of Appeals of the Sixth Circuit in the case of *Royal Oak Drain District, et al. v. Keefe, et al.,* 87 Fed. (2d) 786, in which case counsel for Petitioners herein represented the bondholders, had occasion to interpret the Michigan statutes and determine the jurisdiction of the Drain Commissioner and in so doing properly applied the tests of legality and limits of jurisdiction used by the Michigan Supreme Court in interpreting the Michigan drain statutes and the jurisdiction of the Drain Commissioner. The Circuit Court of Appeals there determined the project to be a legal drain, constructed through legal proceedings, and in doing so found:

1. The ditches were inadequate for the then existing population.

2. There were occasional spots where water stood during wet periods and in the extreme southwest there was a tract of more or less indefinite limits, commonly known as the Hubbard Marsh, which was swampy in character.

3. As the territory grew more urbanized, the ditches were more or less neglected and in 1924-1925 considerable areas between the Hubbard Marsh and the Twelve Mile Road had become marshy and water-logged.

4. "Much of the impetus" to the project was the marshy condition of a large part of the district to be served and the inadequacy of the county ditches which were to be supplanted to take care of the surface water of the area.

5. As in *Kennedy v. Dingman,* 272 Mich. 24, the existing cities of Royal Oak, Ferndale, Berkley, Pleasant Ridge and Huntington Woods, and the Villages of Oak Park and Clawson had sewage facilities and the project was for relief in the way of both sewage and drainage facilities.

6. The depth was sufficient to allow basement drainage from adjacent buildings only.

7. Michigan Supreme Court had not determined the character of the project as a sewer or drain.

Applying these tests to the case at bar we find:

1. That the ditches which were open drains established through assessment of taxpayers, were adequate for surface drainage for the existing population and would be for some time in the future (R. 425, 457, 459, 481, 508, 619, 624, 704, 737, 742, 743, 746, 750).

2. There were no low or marshy or water-logged areas (R. 427, 508, 513, 514, 696, 737, 746).

3. The open drains were not neglected as the territory became urbanized, except for the sewage nuisance.

4. The existing municipalities did not have separate sewage facilities (R. 424, 714).

5. The entire area, urban and suburban, was without sanitary sewage facilities (R. 425, 497, 750) (M. R. 155, 163).*

6. The depth was sufficient to furnish sewage facilities to the entire assessment district (R. 298, 526).

7. The inescapable conclusion is that "much of the impetus" to the project and, in fact, the primary purpose of the design and construction thereof was sewage disposal (R. 261, 424, 425, 438, 447, 448, 450, 451, 483, 495,

*M. R. refers to Master's Report.

497, 701, 727, 731, 732, 734, 736, 737, 739, 740, 743, 744, 761, 799, 800) (M. R. 156, 163).*

8. The Michigan Supreme Court had decreed the Nine Mile-Halfway project to be a sewer (M. R. 151).*

9. The undisputed testimony is that if the sewage was eliminated from the ditches, the existing nuisances and health menaces would likewise be eliminated. In other words, the problem was sewage disposal (R. 290, 424, 425, 427, 438, 447, 448, 450, 451, 483, 497, 701, 704, 727, 731, 732, 734, 736, 737, 739, 740, 742, 743, 799, 800).

The Master recognized some of the foregoing distinctions when he found (R. 169):

> "The evidence is also distinguishable from that in the Royal Oak case, where the Circuit Court of Appeals held the dominant purpose of the project to be drainage in several fundamental respects: (1) The natural drainage in the Royal Oak District was decidedly poorer, there being several marshy areas, chief of which was the large Hubbard swamp, the desire to eliminate which was a primary factor in the initiation of the project. (2) The designing engineers of the Royal Oak Drain testified that they intended the project to function primarily as a drain, and persistently so represented to the Drain Commissioner at the time; while here the designing engineer testified the intention from the beginning was to furnish complete service to the community. (3) The Royal Oak Drain took in sewage from only part of the district, other parts being already served by village or city sewer systems; while here there were no other outlets for sewage except the open drains. (4) There was no treatment plant in connection with the Royal Oak Drain. (5) The structure in the Royal Oak case appears to have

*M. R. refers to Master's Report.

been considerably shallower than here and not to have afforded basement drainage to all parts of the district where it would have been possible so to provide."

In addition to the tests which the Circuit Court of Appeals of the Sixth Circuit applied in coming to its decision in the Royal Oak case, this question must be construed in favor of respondents and appellants below because of the following undisputed facts:

1. The project, as designed, was a closed conduit deep enough underground at the upper end and throughout the assessment district so that laterals could be constructed to furnish sewage facilities, at basement levels, for the entire assessment area, which construction is essential for sewage purposes and is not essential for surface drainage purposes (R. 526, 535-539).

2. The joints in the project were closed to prevent land drainage and to prevent the seepage of sewage, and the Michigan Supreme Court in the cases—*Meyering Land Company v. Spencer,* 273 Mich. 703; *Hankinson v. Deake,* 265 Mich. 1, and *Hoad v. VanWagoner,* 278 Mich. 600, and in other decisions gave material consideration to whether or not the joints were open or closed in determining, as is stated in the Meyering case, whether they were constructed primarily for the purposes of land drainage, or for sewage purposes (R. 432, 511, 526, 527, 539).

3. The project was designed and built so that the laterals would follow streets for sewage purposes. Michigan Supreme Court attached significant importance to this in the Meyering case and other decisions showing the purpose to be to furnish sewage facilities. The undisputed testimony in this case is that connections were made by individuals without the consent of the municipalities and with the consent of the Drain Commissioner as soon as the

project was available for use and that a large number of permits in this case have been issued by the Drain Commissioner's office to individuals for sewage use (R. 405, 406, 407, 415, 417, 510, 511, 619, 802).

4. The plans, specifications and records of the proceedings frequently call this project a "sewer" and in various places plainly indicate that it was to be used for sewage disposal, and anyone examining the same should have known that the primary purpose was sewage disposal (R. 305, 365, 408-415, 436, 437, 502, 549, 550, 590, 591, 605, 613, 614, 618, 625, 626, 751).

5. Design and use of the project was primarily for the disposal of raw sewage without the septic treatment referred to in *Hankinson v. Deake,* 265 Mich. 1 (R. 436).

6. The catch basins and drop manholes as designed and constructed are an essential characteristic of a sewer to eliminate odors and not an essential characteristic of a drain (R. 433, 434, 463, 620, 620) (M. R. 157).*

7. The sewage disposal plant, as designed and constructed, is an essential characteristic of a sewer (R. 543, 545, 547, 548, 561, 568-570, 606, 607, 609, 610, 619, 630, 631).

8. From the plans themselves, it is an obvious conclusion that laterals for use must be constructed if benefits were to be had for assessments made (R. 330, 371, 567, 613, 614, 615, 617).

9. The testimony of the engineer designing the Nine Mile project and the supporting testimony of other engineers on this project is that the project was designed primarily for sewage facilities (R. 440, 486, 487, 495-497, 502, 511, 512, 529, 530, 543, 547, 548, 569, 570, 577, 590, 591, 605, 618, 620, 625, 626, 630, 668, 751, 756, 761).

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*M. R. refers to Master's Report.

10. Considering future needs, the project was large enough to furnish sewage facilities for any contemplated increase in population within the assessment area, but not large enough to furnish drainage facilities were the assessment area to become an urban or suburban area (R. 439, 501).

11. There can be no economic justification for the building of the project in this district where the dominant purpose is drainage, and it was so held by the Michigan Supreme Court in *Township of Lake v. Millar* (R. 263, 608, 614, 619, 775).

12. In the Nine Mile case, not only has the Michigan Supreme Court held the project to be a sewer, but Judge Simons in the Royal Oak case stated that the disposal plant clearly marked the project as a sewer. This statement is not to be lightly regarded.

13. The projects built in the adjoining Detroit area were constructed as sewers by the City of Detroit under the statutes authorizing the construction of sewers and not by the Drain Commission. This adjoining Detroit area, at the time, had the same population and the same needs and the projects were constructed for a similar purpose, that is, first to furnish sewage facilities and, second, incidentally, for drainage purposes (R. 494, 495, 553, 571, 572, 607, 608, 611, 752, 756, 760, 765).

14. The primary purpose of sewage disposal is further shown by the Master Plan for sewage disposal. The primary purpose of sewage disposal was discussed with the consulting engineer of Professor Hoad's engineering firm and the report of this engineering firm introduced in evidence as Exhibit A-4 (R. 341-349) and letter of transmittal dated August 10, 1927 (R. 313, 314), is further proof of this primary purpose (R. 324, 325, 349, 355, 358, 368).

15. The primary use of the project has been to furnish sewage facilities. The presumption is that the use of a given project will be consistent with its primary purpose. The Michigan Supreme Court has frequently referred to other sanitary sewage facilities available, the house connections made in a project, the use or non-use of septic tanks and other matters of use in determining the primary purpose of projects to be sewers or drains. From the plans themselves it is an obvious conclusion that laterals for use must be constructed if benefits were to be had for assessments made. The undisputed testimony is that laterals have been constructed as the existing population was able to pay for sewage facilities. There is an absence of testimony to the effect that laterals were ever constructed to furnish drainage. The undisputed testimony is that the project was used for sewage disposal while still in the process of construction and has been so used since construction (R. 405-407, 415-417, 436, 486, 509-511, 526, 567, 613-615, 617, 619, 802).

16. The inspection of the sewage disposal plant, the outlets into the lake, the interior of the main conduits made through entry through manholes, the type of construction of existing and projected homes for people in low income brackets and a general inspection of the district, as made by the Master accompanied by counsel, leads to the irresistible conclusion that the primary purpose of the project was the furnishing of sewage facilities to the entire district.

17. The testimony is that the Drain Commissioner and the designing engineer had received legal opinion to the effect that they could build a sewer under the Drain Law and in the contracts, a part of the record of the proceedings, a drain was defined to include a sewer as follows:

> "Drain—Any ditch, tile, drain, sewer, or any other interpretation of the word 'drain' as described in Chapter I, Section 2, of Public Act No. 316, of the State, and any acts amendatory thereof" (R. 382, 470, 505, 668).

The Michigan Supreme Court in all its decisions had to interpret the drainage statutes so as not to do violence to Article VIII, Section 15a, of the Michigan Constitution of 1908, which reads:

> "Any drainage district, established under provision of law, may issue bonds for drainage purposes within such district."

2. The Master, the District Court in Overruling Petitioners' Exceptions to the Master's Report, and the Circuit Court of Appeals Were Correct in Applying the Michigan Supreme Court Decisions to the Record in This Case in Their Final Determination That the Michigan Supreme Court Has Been Consistent in Its Interpretation of the Drain Act, and in Its Holding That the Project Is Illegal and the Proceedings Void From Their Inception.

Petitioners when confronted with the decisions of the Michigan Supreme Court, the decision of the Circuit Court of Appeals and respondents' unanswerable contentions, now resort to the one argument that the legality of the bonds must be determined solely from an examination of a portion of the proceedings. They attempt to support this position by an analysis of the *Detroit Trust Company v. Dingman, supra,* claiming, as set forth in the Statement of Facts of their Petition, page 10, that the Circuit Court of Appeals did not properly consider the Detroit Trust Company case, and further, that the Michigan Supreme Court has not been consistent in following out its original inter-

pretation of the Drain Act. There can be no dispute about the fact that the bonds are issued as a part of the proceedings, and petitioners in their statement of the case, page 3 of the Petition for Certiorari, so state. They refuse, however, to recognize the established law of the State of Michigan that the legality of the proceedings and the project constructed must be determined from a combination of circumstances and conditions, of which the proceedings are a part, and that the State Court has consistently held that where the Drain Commissioner exceeded his jurisdiction proceedings are void from their inception. We shall presently show that petitioners are wrong in their interpretation of the Detroit Trust Company case and that the Michigan Supreme Court has been consistent in interpreting the Drain Act and the jurisdiction of the Drain Commissioner.

In referring to *Clinton v. Spencer,* 250 Mich. 135, as the leading Michigan Supreme Court case, the Master held (R. 168):

> "The Supreme Court has been consistent in following out its original interpretation of the Drain Act in subsequent cases, although because of the inevitable difficulty of weighing purposes in a combined structure the distinction between legal and illegal projects has at times become very fine."

As previously stated, the Nine Mile project and proceedings were decreed illegal in the Township of Lake case. The court there held that the extent of the authority of the drain commissioner was measured by the statute from which he derived his authority and not from his own acts and assumptions of authority. This case has frequently been cited as authority by the Michigan Supreme Court and the Detroit Trust Company case has not changed the State Court's reference to it as precedent. In the Detroit

Trust Company case the State Court stated that its decision came within the same Court's decision in *Hankinson v. Deake,* 265 Mich. 1, and *Kennedy v. Dingman,* 272 Mich. 24, and we cite these and other Michigan cases as a complete answer to petitioners' contention that the holdings of the Michigan Supreme Court no longer support respondents' contention. In *Hankinson v. Deake,* 265 Mich. 1, the State Court held, page 7:

> *"If the structure is a sewer, the drain commissioner was absolutely devoid of jurisdiction in the premises and the entire proceedings were a nullity and subject to attack by the methods employed herein. Township of Lake v. Millar,* 257 Mich. 135." (Italics ours.)

In *Kennedy v. Dingman,* 272 Mich. 24, the Court said, on Page 27:

> "The LeBlanc drain is less like a sewer than the project involved in *Township of Lake v. Millar,* because it has no pumping station or filtration plant connected with it, but it is also more like a sewer than the project involved in *Hankinson v. Deake,* because it is monolithic construction without porous joints."

On Page 30, the Court stated:

> "In the case of the *Township of Lake v. Millar, supra,* as stated in the opinion, a sewer was built about 7½ miles long, in places 35 feet below the surface, with a circular concrete barrel ranging from 6 to 11 feet in diameter, and with a purifying plant for sewage treatment in connection therewith. *The record shows that the main and primary purpose was the construction of a drain and not a sewer, although in a few instances the latter use might become incidental."* (Italics ours.)

In *Meyering Land Co. v. Spencer,* 273 Mich. 703, on page 708, the Court said:

> "If a sewer was constructed in pursuance of a petition for a drain, the drain commissioner was without jurisdiction to establish it. *Clinton v. Spencer, supra; Township of Lake v. Millar, supra.*"

Judge Simons of the Sixth Circuit Court of Appeals had these decisions before him when he held in the case of *Royal Oak Drain District v. Keefe,* 87 Fed. (2d) 786, that the Nine Mile project was a sewer and not a drain, as follows:

> "Doubt as to the legality of the proceedings was first entertained after the Michigan Supreme Court on March 7, 1930, in *Clinton v. Spencer,* 250 Mich. 135, invalidated assessments and enjoined the collection of taxes for the construction of the Southfield Drain. This was a large underground sewer entirely independent of any other drainage project, and its construction was held not authorized by the drain law. There followed *Kinner v. Spencer,* 257 Mich. 143, a decision to the same effect in respect to assessments for the identical project. Meanwhile, in *Township of Lake v. Millar,* 257 Mich. 135, the court enjoined assessment and collection of taxes for a project in Macomb County for the maintenance of a drain disposal plant, filtration beds and purification plant, which clearly marked the enterprise there as a sewer."

We submit that the Michigan Supreme Court was consistent in following out its interpretation of the Drain Act in the Detroit Trust Company case, and that this case is to be distinguished on the following grounds:

1. The drain commissioner testified and the record discloses that the primary purpose was drainage and that the furnishing of sewage facilities was incidental, whereas in the Nine Mile case the record, including the testimony

of the designing engineer and other engineers, discloses that the primary purpose was to furnish sewage facilities and that drainage was incidental. A complete answer to petitioners' contention that the legality of the proceedings, of which the bonds are a part, must, under Michigan law, be determined from an examination of the proceedings only, is found in the Detroit Trust Company case where the Michigan Supreme Court gave sufficient consideration to the testimony of the Drain Commissioner, who was an engineer, as to the purpose of the project to quote such testimony in its opinion on Page 176, as follows:

> "Q. Were you building this structure there to take their sewage, or to take their surface water; which?
>
> A. It was to take the surface water, the storm water, and the subsurface water, *and incidentally, the sanitary.* (Italics ours.)
>
> • • • • •
>
> Q. Would you say, in your opinion as an engineer, that the size of the filtration basin and septic tank would indicate that the disposal of sewage was incidental to the structure as a whole?
>
> A. Yes."

A study of the Detroit Trust Company case leads to the conclusion that the Michigan Supreme Court determined that there was an urgent need for drainage, and everyone connected with the construction of the project know from the outset that the sewage factor would be incidental to the drainage and the Drain Commissioner so testified.

2. The Michigan Supreme Court held in the Nine Mile case that the project was a sewer and that the dominant purpose was to furnish sewage facilities, and the same court held in the Detroit Trust Company case that the dominant purpose was drainage and that the furnishing of sewage facilities was incidental.

3. The record in the Detroit Trust Company case discloses that the project was part of a general plan for drainage and that the existing drainage was not adequate, whereas in the Nine Mile case the record discloses that the drainage was adequate and the project was part of a master plan for sewage disposal.

4. It is important to note that the Michigan Court in the Detroit Trust Company case considered how the project was used after construction in determining its purpose, the Court stating on page 177:

> "That this structure is in fact *effectively used* as a means of underground drainage for this district is indicated by the following testimony given by one of plaintiffs' witnesses who all his life had lived on Grosse Ile and at the time was highway commissioner." (Italics ours.)

5. The record in the Detroit Trust Company case discloses that a portion of the area had sanitary sewage facilities before the project was planned, whereas in the Nine Mile case the entire assessment area was without sanitary sewage facilities.

6. The *Michigan Supreme Court Records and Briefs* in the Detroit Trust Company case, Volume 3170, substantiate our position as to the distinguishing features in that case. We quote from Page 49 of the brief of counsel for defendants and appellants:

> "The case of *Township of Lake v. Millar*, 257 Mich. 135, and decided March 2, 1932, was also an action to enjoin the assessment and collection of taxes for a project known as 'Nine Mile Half Way Drain' situated in Macomb County. From a perusal of the case and the type of the structure, and the prominence of a sewage disposal plant the court said, in substance, in its determination: in enjoin-

ing the assessment and collection of taxes, that the sewage disposal plant, filtration beds and purification plants clearly mark the enterprise in the *Township of Lake v. Millar* as a sewer, and the similarity of the structure as compared to the project involved in the case of *Clinton v. Spencer, supra,* whereas, in the instant case there are no filtration beds, nor is there a sewage disposal plant. There is, however, a small diversion chamber and septic tank negligible in size which the record discloses was built for the purpose of providing for the incidental need of such sewage as would be carried off by this drain.

"In the Lake Township case the court said that the drain in question was similar to the drain involved in the *Clinton v. Spencer* case. It certainly cannot be said that the structure in the *Clinton v. Spencer* case and the Lake Township case and the attendant circumstances pertaining thereto are in any way comparable with Grosse Ile Tile Drain No. 4 as to their physical construction."

Again, in distinguishing the *Meyering Land Company* case, 273 Mich. 703, the brief states on Page 58:

In the case at bar, however, the record shows that there was a need for drainage, and that a plan had been formulated for the draining of the whole of the Island of Grosse Ile, and that drains one, two, three, eight and nine were constructed for the purpose of drainage, and that as a part of the originally formulated plan, Grosse Ile Tile Drain No. 4 was added to and became a part of the Drain Commissioner's plan for providing drainage for the Island of Grosse Ile (Ex. No. 3). The necessity for the drainage is clearly indicated in the forepart of this brief where it shows that the roads were in a bad condition; that there were low spots on the island, and that it was impossible for the citizens of the community to send their children to school. The record further shows not only these circum-

> stances as indicating the necessity for drainage on the Island of Grosse Ile, but also the very minutes of the Township meetings relating to this particular area, evidenced the necessity and their desire for proper drainage in this particular community, and that the conditions were so acute that funds were appropriated for the purpose of defraying the cost of a survey of this particular area relative to drainage."

In the Detroit Trust Company case the court states the controlling question is whether the construction involved in this case was in good faith laid out and built as a drain or whether it in fact was conceived and constructed as a sanitary sewer. Applying this test to the Nine Mile case leads to the one conclusion that the project was not in good faith laid out and built as a drain but was conceived and constructed with the dominant purpose of furnishing sewage facilities. The Supreme Court, in the Detroit Trust Company case, gives some consideration to Section 5, Chapter XVII of Act 365 of the Public Acts of Michigan for 1925, quoted at Page 14 of the appendix to Petitioners' Brief, permitting the use of county drains for sewage disposal plants, and it is to be noted that the same court gave full consideration to this provision of the law on the Nine Mile project in the *Township of Lake v. Millar* case, as is set forth in full on Page 26 and referred to on Page 31 of the brief of the drain commissioner and special counsel for the bondholders, Miller, Canfield, Paddock & Stone, appearing in *Volume 2360* of the *Michigan Supreme Court Records and Briefs.*

An examination of Section 5, Chapter XVII, of Act 365 of the Public Acts of Michigan for 1925, in conjunction with the history of and the record of the Nine Mile project, discloses that the sewage disposal plant was illegal, as part of a project in which the primary purpose was not drainage, because:

1. The project is a closed conduit constructed of monolithic concrete deep underground and is not one which could be enlarged or widened and even the cleaning would be questionable as contemplated by Section 5.

2. The project was not one then available, but was new construction.

3. The Attorney General had rendered an opinion that it was unlawful for individuals to use a county drain for sewage disposal as this project was designed for and used (R. 804, 805).

4. The Act provides that a percentage of the costs of construction shall be apportioned to municipalities, such as the City of East Detroit and City of Centerline, and no such apportionment was ever made in the proceedings and plans and specifications, or at any subsequent time (R. 694) (M. R. 159).*

We respectfully submit that the Circuit Court of Appeals properly determined the entire proceedings void because the Drain Commissioner was absolutely devoid of jurisdiction in the premises and in doing so properly applied the Michigan Supreme Court decisions and did not, as contended by petitioners, decide an important question of local law in conflict with local statutes and decisions of the State.

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*M. R. refers to Master's Report.

(b) THE CIRCUIT COURT OF APPEALS WAS CORRECT IN ITS DECISION ON THE EFFECT OF THE RECITALS IN THE BONDS.

Petitioners in briefing the question as to the effect of the bond recitals have completely disregarded three important principles of law which are controlling as to the issue of estoppel in this case:

1. Estoppel does not apply to the appellants who did not sign the bonds or make any representations pertaining thereto.

It is the contention of respondents, other than the Drain Commissioner, that they are not estopped to deny the validity of the bonds because they did not sign the bonds, because they are not parties to the bonds and because they made no representations in respect to the bonds.

The whole theory of estoppel by recitals is that the obligor in the bond made certain statements or representations on the face of the bond which said obligor would be subsequently estopped to deny the trust of as against an innocent holder of said bond for value. The obligor in the bonds sued on is expressly stated to be the drain district only. The County of Macomb or the appellant townships, city or village not being obligors in said bonds nor parties thereto, obviously made no recitals or representations, and hence cannot be estopped.

It is elementary that the doctrine of estoppel arising out of recitals in bonds cannot apply against appellants who are not parties to the bonds.

The United States Supreme Court in the case of *Deery's Lessee v. Cray*, 18 L. Ed. 653, stated:

> "* * * No person can rely upon estoppel growing out of a transaction to which he was not a party nor a privy, and which in no manner touches his rights. There is no mutuality, which is a requisite of all estoppels."

The Michigan Supreme Court has from an early date, as appears from decisions hereinafter cited, held that the Drain Commissioner is not the agent of the municipalities and the county, and there is no authority which can make him the agent of any of the appellants to make representations or to enter into any mutual agreement. In *Township of Cooper v. Little,* 220 Mich. 62, the court said, on Page 64:

> "In a long line of cases beginning with *Dawson v. Township of Aurelius,* 49 Mich. 479, this court has uniformly recognized that the fiscal affairs of a drain were separate and distinct from the general fiscal affairs of the municipality and *that the municipality was not bound or obligated by the acts of the drain commissioner.* Among the cases see *Camp v. Township of Algansee,* 50 Mich. 4; *Wallace v. Sortor,* 52 Mich. 159; *Taylor v. Township of Avon,* 73 Mich. 604; *Hillyer v. Township of Jonesfield,* 114 Mich. 644; *Jenney v. Township of Mussey,* 121 Mich. 229." (Italics ours.)

On Page 65, the Court stated:

> "These authorities conclusively establish the law to be that the municipality is not in any way interested in the fiscal affairs of the drain. The township is in no way chargeable with the acts of its officers in the administration of the drain law, *nor can the county be so chargeable."* (Italics ours.)

See also *Brooks v. County of Oakland,* 268 Mich. 637, in which case the court made the following statement on Page 639:

"Moreover, the county is not liable for the refund of void drain taxes. The drain commissioner, in establishing the project, and the county treasurer, in taking and handling the assessments, *are not agents of the county* nor are the funds received for the use of the county. The officers perform special statutory duties for drainage districts. The reasons and principles governing township liability under similar statutes and set out in the following cases are applicable: *Taylor v. Township of Avon,* 73 Mich. 604; *Hillyer v. Township of Jonesfield,* 144 Mich. 644; *Brown v. Warner,* 159 Mich. 274. And *Township of Cooper v. Little,* 220 Mich. 62, in which the court, after a review of the authorities, said:

> 'These authorities conclusively establish the law to be that the municipality is not in any way interested in the fiscal affairs of the drain. The township is in no way chargeable with the acts of its officers in the administration of the drain law, nor can the county be so chargeable.'

"Liability of the county is not established by 1 Comp. Laws 1929, section 4937, which provides for payment of principal and interest on bonds out of *general county funds* when the drain fund is insufficient." (Italics ours.)

We submit that under the authorities cited that even if the Drain Commissioner should be held to be estopped to deny the validity of the bonds, the other appellants are not so estopped. The bonds were signed by the Drain Commissioner only and the full faith and credit of the drainage district only is pledged. Appellants other than the Drain Commissioner made no representations in respect to the bonds. The Drain Commissioner is not the agent of appellants other than himself, and they are not bound by his representations or acts. There is no mutuality of contract between the holders of bonds and appel-

lants, who did not sign the bonds or make any representations pertaining thereto. The elementary law under the authorities cited is that to create an estoppel there must be a representation by word or act of the party estopped, which has misled the party asserting the estoppel to his damage, and that the element of mutuality must be present.

The legal and logical conclusion, therefore, is that the appellants other than the Drain Commissioner are not estopped to deny the validity of the bonds.

On this point the Circuit Court of Appeals properly held:

> "The theory of estoppel by recital is that the holder of the instrument is entitled to rely upon the facts recited in the bond. Each of the bonds in question certified that all acts had been done in order to make the bonds a binding obligation of the drain district. No bond makes any recital with reference to its being an obligation of the township or municipality in which the project is situated. Only one set of bonds, that of the Bloomfield Storm Sewer Drain District, recites the statutory obligation of the county to advance funds on the projects. None of the bonds is executed by any township, municipal or county officer, with the exception of the county drain commissioner and the county clerk. Under Michigan law the drain commissioner does not represent any political entity except the drain district, and his representations are in no way binding upon the townships, the municipalities or the counties, for none of these political subdivisions is chargeable either with the acts of the drain commissioner or with the acts of its officers in the administration of the drain law. *Township of Cooper v. Little,* 220 Mich. 62, 64. Moreover, the county is not liable for the refund of void drain taxes, since the drain commissioner does not act for the county in the establishment of the project. *Brooks v. County of Oakland,* 268 Mich. 637, 639.

> The county clerk is merely the clerical officer of the county. He has no authority to pledge the faith and credit of the county nor to certify on behalf of the county to facts stated in the bonds. His signature is placed upon the instrument as a certification of the authenticity of the signature of the county drain commissioner.
>
> "We conclude that appellants other than the drain districts are not estopped to defend upon the ground of illegality of the various projects, and that as the proceedings are plainly null and void under Michigan law, the District Court erred (1) in ordering the appellants, municipal township and county officials in all cases, to proceed to assess drain taxes in these projects; (2) in issuing injunctions against such officers, and (3) in ordering the counties to make advancements into the drain district funds."

2. Bondholders are not entitled to rely upon recitals in the bonds where the Drain Commissioner was completely lacking in jurisdiction to issue the bonds or to create any legal liability whatsoever in the undertaking.

In section 2 (b) of petitioners' brief, a considerable amount of space has been devoted to the question of estoppel by recitals. However, it clearly appears that the Drain Commissioner was without jurisdiction and that the proceedings were illegal and void in their inception. In the case of *Township of Lake v. Millar, supra,* where this identical project was found and decreed to be illegal, the Michigan Supreme Court stated:

> "Defendants contend, and the trial court held, that, plaintiffs not having attacked the regularity of the proceedings here involved by certiorari, are estopped from questioning their regularity in this proceeding.
>
> • • • • •

"The question is presented whether a petition for a drain confers jurisdiction upon the drain commissioner to build a sewer; whether a petition to the drain commissioner to do something within the scope of his authority confers jurisdiction upon him to do something wholly without the scope of his authority; whether a petition to do something he has a right to do confers jurisdiction upon him to something which he has no right to do; whether upon filing a petition for a drain which he has a right to build, the commissioner may lay out and construct a sewer which he has no right to build? A drain commissioner may not, by mere assumption of authority, legally do that which he has no authority to do. If, upon a petition to do what he has a right to do, he may do what he has no right to do, the extent of his authority is measured by his own acts and conduct and not by law. The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority. The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but AN ENTIRE WANT OF JURISDICTION MAY BE TAKEN ADVANTAGE OF AT ANY TIME. The drain commissioner had no jurisdiction to construct a sewer any more than to construct a Covert road. No one will contend that if the drain commissioner, when the petition for a drain was filed with him, had laid out an assessment district, established and constructed a Covert road, the plaintiffs would have been without remedy. The same legal question is here presented. THE PROCEEDINGS ARE VOID FOR WANT OF JURISDICTION." (Emphasis supplied.)

See also the cases of *Hankinson v. Deake,* 265 Mich. 1; *Kennedy v. Dingman,* 272 Mich. 24; and *Meyering Land Co. v. Spencer,* 273 Mich. 703, where the Michigan Supreme

Court decision on this project has been cited as a precedent for the established law that where the project is illegal, as in the case at bar, the Drain Commissioner was, as stated by the Michigan Supreme Court in *Hankinson v. Deake,* absolutely devoid of jurisdiction in the premises and the entire proceedings were a nullity. It is also important to note that in the case of *Clinton v. Spencer,* 250 Mich. 135, the Michigan Supreme Court held the proceedings to be void from their inception. These Michigan cases clearly stating the law to be that where the Drain Commissioner is without jurisdiction the proceedings are void from their inception, are, of course, binding upon the Federal Courts under the doctrine of *Erie Rd. v. Tompkins, supra.*

Having established the fact that the proceedings were void in their inception, it follows that the bonds which were issued as a part of the proceedings are also void. The Michigan courts have repeatedly held that the doctrine of estoppel is not applicable where the projects are illegal because of a total lack of jurisdiction in the Drain Commissioner. It was so held by the Michigan Supreme Court in the case of *Township of Lake v. Millar, supra,* with reference to the question of estoppel against the taxpayers for failure to take certiorari proceedings and in the *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, the Michigan Supreme Court stated:

> "These authorities conclusively settle the law in this State that, property owners assessed for benefits, even though they participate in the improvement and fail to avail themselves of the statutory remedy for review, are not estopped to thereafter attack such proceeding, where the objections raised go to the jurisdiction and involve constitutional rights.
>
> "The general rules of estoppel, as applied to void acts, are thus summarized:

'In accord with the general rules already discussed, the rule is laid down broadly in many decisions that a municipal corporation is not estopped to deny the want of power to make a contract by receiving the benefits thereof; and it has even been held that a full performance by the contractor of a contract with a city which is void because opposed to the Constitution and laws and contrary to public policy will not prevent the city from pleading its want of power and the illegality of the contract. If the thing done is illegal or unwarranted by law, however beneficial it may be, the public is not estopped to deny its validity.' *21 C. J.* p. 1214.

'The doctrine of estoppel cannot be applied against the city to validate a contract which it has no power to make, or which has ceded away, controlled, or embarrassed its legislative or governmental powers. Generally a municipal corporation is not estopped from denying the validity of a contract made by its officers, when there has been a total absence of authority for making such contract. And if the contract is absolutely *ultra vires,* the municipality is not estopped to deny its validity, though the benefits thereof have been received by the municipality.' *10 R. C. L.* pp. 708, 709.''

The Circuit Court of Appeals, Sixth Circuit, recognized the applicable rule of law in the case of *Royal Oak Drain District v. Keefe,* 87 Fed. (2d) 786, when it held:

''The argument is pressed that the structure for the payment of which the bonds were issued was a sewer and not a drain, and so not under the jurisdiction of the drain commissioner under Michigan law. His acts are said to have been mere usurpations, and it is urged he was without power to issue bonds or create any legal authority in the undertaking. If the premise is sound, the argu-

ment is persuasive and based upon unimpeachable authority. *Anthony v. County of Jasper,* 101 U. S. 693, 697; *German Savings Bank v. County of Franklin,* 128 U. S. 526; and many other cases."

The Circuit Court of Appeals in its opinion in this case well stated the applicable rules and cases on the point when it held:

> "The decrees in the Meyering Land Co. and Detroit Fire and Marine Ins. Co. cases, *supra,* construing as they do the Michigan county drain law, are binding upon this court. Rulings of state courts construing state statutes were binding upon federal courts prior to the announcement of *Erie Rd. Co. v. Tompkins,* 304 U. S. 64. Certainly since that decision the federal courts are governed by state law to a greater extent than formerly; but the effect of the holding of the District Court in this case is to set at nought the judgment of the state courts that these projects are absolutely void. The bonds do not recite that the various projects have been determined to be drains rather than sewers, and hence the appellants, in seeking to show that they are in fact sewers and illegal, are not seeking to establish any facts inconsistent with the recitals. While in the Michigan cases involving these projects the bondholders were not joined as parties, it is the law of Michigan that where the projects are illegal not from mere procedural deficiency, but from total lack of authority to construct the projects, bonds issued to defray the expense of such projects are void in the hands of innocent holders, and this law we follow. *Erie Rd. Co. v. Tompkins, supra; Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202. The rule that where the issuing officials are completely lacking in power to issue bonds for the particular purpose, *bona fide* purchasers are not entitled to rely upon recitals in the bonds to the effect that the legal and statutory

prerequisites have been complied with, was recognized in *Royal Oak Drain Dist. v. Keefe, supra.* There this court said that if the drain commissioner had no jurisdiction under Michigan law, he was without power to issue bonds or to create any legal liability whatsoever in the undertaking. In this we followed the Michigan decisions. As declared in *Spitzer v. Village of Blanchard,* 82 Mich. 234, 244:

> 'It is not entirely accurate to say that holders of bonds issued by a municipal corporation will be protected as *bona fide* purchasers if the corporation could, under any circumstances, issue the same. This question was considered by the Supreme Court of the United States in *Dixon Co. v. Field,* 111 U. S. 89 (4 Sup. Ct. Rep. 315), where the proper distinction is drawn as to irregularities in the exercise of the power conferred and the total want of power to do the act. Where there is a total want of power, under the law, in the officers or board who issue the bonds, then the bonds will be void in the hands of innocent holders, the distinction being between questions of fact and questions of law. If it is a question of fact, and the board or officers are authorized by law to determine the fact, then their determination is final and conclusive. And although it may be contrary to the fact, yet, if recited in the bond that the necessary and proper steps required by law to be taken had been taken, then the municipality is estopped from denying that they were taken. But it is held that all persons are presumed to know the law, and if the law created conditions precedent upon which the right to act at all depended, and these conditions were not complied with, and the law appointed no board or officer to determine that fact, then there could not be an innocent holder of such bonds. *Bernards Township v. Morrison,* 10 Sup. Ct. Rep. 333.'

"This holding has never been reversed. Hence the test in Michigan as to estoppel raised by recitals in the bonds is whether the officials making the recitals are wholly without power in the premises. If so, no estoppel arises.

"Appellants rely upon certain Michigan decisions which they claim are *contra,* but they are distinguishable in principle. In *Thompson v. Village of Mecosta,* 127 Mich. 522, and *Schmid v. Village of Frankfort,* 131 Mich. 197, the villages themselves took part in a false recital, contrary to facts later sought to be asserted. In *Gibbs v. School Dist.,* 88 Mich. 334, there was not a total lack of power in the officials making the recitals, as here, but failure to comply with statutory provisions.

"We are unable, under the Michigan decisions with reference to these drains, to avoid the conclusion that the drain commissioners had no jurisdiction. The holding of the Michigan courts upon this subject is a conclusion of law and binding here. Since the drain commissioners were without jurisdiction, they were totally without power to make recitals binding upon the drain district, and this circumstance is fatal to any claim of estoppel. *First Wisconsin National Bank v. Bessemer Twp.,* 286 Mich. 426; *Spitzer v. Blanchard, supra; Chemical Bank & Trust Co. v. County of Oakland,* 264 Mich. 673. The recital 'that all acts, conditions and things required to be done have been performed as required by law, was a legal conclusion upon which no purchaser was entitled to rely. *First Wisconsin National Bank v. Bessemer Twp., supra.* An examination of the records which the statute required the drain commissioner to maintain (Section 10, c. 2, Act 316, Michigan Public Acts, 1923) would have revealed all the facts necessary for a determination that the project was illegal. A public official who is not empowered to issue bonds cannot create such power by recitals which he may incorporate in the bonds he issues. *Portsmouth Savings Bank v. Ashley,* 91 Mich. 670."

Petitioners have cited numerous cases which are inapplicable because in said cases there was no finding that there was a complete lack of jurisdiction in the parties who issued the bonds. Petitioners have repeatedly refused to recognize the fact that since the Michigan Supreme Court has held that the Drain Commissioner in this case was without jurisdiction, which decision was concurred in by the Circuit Court of Appeals, and since this Court must follow the Michigan decision the rule stated by the Circuit Court of Appeals, as follows, is clearly applicable, and any other arguments and citations of cases with reference to the effect of recitals in the bonds becomes academic. The Circuit Court of Appeals correctly stated the applicable rule of law in its opinion in this case (R. 986) when it held:

> "Since the Drain Commissioners were without jurisdiction they were totally without power to make recitals binding upon the drain district and this circumstance is fatal to any claim of estoppel."

3. The collection of taxes to pay for the illegal projects would violate the due process clauses of Federal and State Constitutions.

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be * * * deprived of life, liberty or property without due process of law. * * *"

Article II, Section 16 of the Michigan Constitution of 1908 provides as follow:

> "No person shall be * * * deprived of life, liberty or property without due process of law."

The Michigan Supreme Court has, on a number of occasions, held that the levy and collection of a tax to pay

for a void project would constitute the taking of property without due process of law.

> "Here we are not dealing with an irregular exercise of power on the part of the drain commissioner, or, with procedural defects in the proceedings under which the sewers were constructed. The statute did not authorize the construction of either project, or the assessment of the tax. The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law. Under such circumstances, no estoppel would arise to bar an action to restrain the collection of the void tax."
>
> *Village of Oak Park v. Van Wagoner,* 271 Mich. 450.
>
> "If, as we hold, defendants were wholly without authority to lay this drain, the ultimate result of assessment of benefits and the collection from plaintiffs of the drain tax would be to deprive them of their property without due process of any sort. * * * Where the officials acting in the drain proceedings are wholly without jurisdiction or authority to act, the proceeding is void, and equity has power to restrain."
>
> *Fuller v. Cockerill,* 257 Mich. 35.

Article VIII, Section 15-a of the Michigan Constitution of 1908 provides:

> "Drainage District Bonds. Section 15-a. Any drainage district established under provision of law, may issue bonds for drainage purposes within such district."

We respectfully submit that in view of the fact that the Drain Commissioner did not issue bonds for *drainage purposes* in accordance with the Michigan constitutional

provision and that in view of the Michigan decisions quoted above, the Circuit Court of Appeals decided this case in the only way it could have decided it in conformity with the State and Federal Constitutions and the law of the State of Michigan.

(c) THE CIRCUIT COURT OF APPEALS WAS CORRECT IN ITS HOLDING THAT WHERE THE PROCEEDINGS ARE PLAINLY NULL AND VOID UNDER MICHIGAN LAW AND THAT WHEN THE BONDS WHICH ARE A PART OF THE PROCEEDINGS ARE VOID, THE TAX OFFICIALS ARE NOT UNDER A DUTY TO PROCEED TO ASSESS DRAIN TAXES OR TO MAINTAIN DRAIN FUNDS.

Petitioners have sought by the use of one paragraph in the Circuit Court of Appeals' opinion to make it appear that the Circuit Court of Appeals held that regardless of whether the bonds are valid or invalid the tax officials had no power to proceed to assess drain taxes. The Circuit Court of Appeals made no finding on this point one way or the other. The statement referred to by the petitioners (R. 982) was made in the opinion of the Circuit Court of Appeals in which it also held that the bonds were void, and the petitioners' construction of the language used is incorrect and is not what the Circuit Court of Appeals held. However, even if the Circuit Court of Appeals had held what petitioners say it did, there is ample authority for such a holding in the Michigan decisions. In the case of *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, 459, the Michigan Supreme Court held:

> "Here we are not dealing with an irregular exercise of power on the part of the drain commissioner or, with procedural defects in the proceedings under which the sewers were constructed. The

statute did not authorize the construction of either project, or the assessment of the tax. The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law. Under such circumstances no estoppel would arise to bar an action to restrain the collection of a void tax."

(d) PETITIONERS' CONTENTION THAT THE COURT OF APPEALS IGNORED THE EFFECT OF THE STATUTE PROHIBITING COLLATERAL ATTACK ON THE DRAIN PROCEEDINGS IS WITHOUT MERIT.

Petitioners admit the rule of law followed by the state court in *Township of Lake v. Millar, supra,* where the court held in passing upon these identical proceedings:

> "The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari but an entire want of jurisdiction may be taken advantage of at any time. * * * The proceedings are void for want of jurisdiction."

The argument now advanced by petitioners has been repeatedly asserted in the state court until it appears that the state court in *Meyering Land Co. v. Spencer,* 273 Mich. 703, now before this court for consideration in a companion case, became somewhat impatient with passing on the so-called usual claim, when it stated on page 709:

> "The usual claim is made that the proceedings must have been attacked by certiorari. This question has been passed upon by this court in *Clinton v. Spencer, supra; Fuller v. Cockerill,* 257 Mich. 35; and *Township of Lake v. Millar, supra.* I can add nothing to what was said in these cases upon the question of the necessity of resorting to certiorari. It is not necessary where there is no jurisdiction."

The Special Master gave full consideration to this provision of the law in his Report (R. 196) where he stated:

> "The Supreme Court of Michigan has held this statute does not apply where the Drain Commissioner has undertaken a project beyond his jurisdiction. *Township of Lake v. Millar, supra,* and other cases."

Petitioners did not file any exception to the last mentioned finding of the Special Master and cannot now raise the question.

The Master correctly found that the doctrine stated in *Douglas v. Pike County,* 101 U. S. 677, was a logical development of the doctrine announced in *Swift v. Tyson,* and that since that case has been overruled "it would seem that the superstructure of law erected on that case should fall with it" (R. 173).

Petitioners' argument is just another instance where they refuse to recognize the doctrine of *Erie Rd. Co. v. Tompkins,* 304 U. S. 694, and subsequent cases, as to the binding effect upon federal courts of state decisions, that except in matters governed by the federal constitution or acts of congress the law to be applied in any case is the law of the state.

Moreover, it must be admitted that it is the rule in Michigan that where the officials acting in the drain proceedings are wholly without authority to act, the proceedings are void and the collection of drain taxes from the appellants would be unconstitutional because it would deprive them of their property without due process of law. The Michigan Supreme Court so held in the case of *Fuller v. Cockerill,* 257 Mich. 35, in which it said:

> "If, as we hold, defendants were wholly without authority to lay this drain, the ultimate result of

> assessment of benefits and the collection from plaintiffs of the drain tax would be to deprive them of their property without due process of any sort. * * * Where the officials acting in the drain proceedings are wholly without jurisdiction or authority to act, the proceeding is void, and equity has power to restrain."

The argument of respondents that the assessment and collection of drain taxes for a project void for lack of jurisdiction in the drain commissioner would violate the constitutional rights of the respondents, has been more fully developed herein on pages 51 to 53.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS NOT IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, OR OF THIS COURT

Petitioners state as their third reason for the allowance of the writ that the Circuit Court of Appeals has decided important questions as to the powers of federal courts to restrain actions to enforce judgments of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals (Eighth Circuit) in *Fetzer v. Johnson,* 15 Federal (2d) 145, and in conflict with the decision of this court in *Chase National Bank v. City of Norwalk,* 291 U. S. 431. Petitioners say that the Circuit Court of Appeals in this case *apparently* decided an important question in conflict with the Fetzer case and the Chase National Bank case because it failed to restrain by its injunction parties before it in this case from using the state court decrees in a manner inimical to parties who seek relief before them. Petitioners' contention on this point is based upon a false premise. In this case the Circuit Court of Appeals did not decide that if the bonds

were for any reason held to be valid that the injunction of the state courts forbidding the collection of taxes could not be overridden. The Circuit Court of Appeals made no finding upon this question one way or the other. There was no necessity for the Circuit Court of Appeals to pass on this question because the Circuit Court of Appeals had found that the proceedings were void, that the doctrine of estoppel by recitals was not applicable, that the bonds were void and that the Bills of Complaint should be dismissed, so it is difficult to understand petitioners' contention when there could be no possible occasion for such a decision by the Circuit Court of Appeals and when in fact no such decision was made by the Circuit Court of Appeals. Even petitioners evidenced doubt of the correctness of their contention when they stated that "an important question which the Court of Appeals has *apparently* decided in conflict with this court * * *."

Since the Circuit Court of Appeals made no such decision we respectfully submit that this contention of petitioners is not a proper reason for granting certiorari. See the case of *Layne and Bowler Corp. v. Western Well Works,* 261 U. S. 387, 67 L. Ed. 712, in which this Court held that a writ of certiorari granted by this court to settle a conflict between decisions of two Circuit Courts of Appeal will be dismissed as improvidently granted if examination disclosed that there was in fact no conflict between the decisions. Since there is no decision by the Circuit Court of Appeals in this case upon the point raised by petitioners there is no basis for the allowance of the writ.

Even if the Circuit Court of Appeals had held what the petitioners have erroneously assumed that it held, the fact that such a holding conflicted with the holding of the Circuit Court of Appeals (Eighth Circuit) in *Fetzer v.*

Johnson, supra, or of this court in the Chase National Bank case would have no controlling effect here because the decision of the Circuit Court of Appeals in this case would have been based on the law of Michigan and the United States Supreme Court will not grant certiorari in a case where the decision of the Circuit Court of Appeals is controlled by state law solely because the decision is in conflict with the decision of other circuits. The decision of this court in *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290, is controlling as to petitioners' contention on this point:

> "As to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States as the conflict may be merely corollary to a permissible difference of opinion in the state courts."

Petitioners have also failed to take into consideration the effect on the Fetzer case of the holding of this Court in the cases of *Erie Railroad v. Tompkins, supra,* and *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290. If the Eighth Circuit Court of Appeals were to pass on facts in that case at this time there would undoubtedly be a decision to the effect that the decision of the Supreme Court of Oklahoma must be followed.

IV.

PETITIONERS ARE NOT ENTITLED TO HAVE THIS COURT WITHHOLD ITS DECISION IN THIS CASE PENDING THE DECISION OF THE MICHIGAN SUPREME COURT IN THE CASE OF HIGHLAND PARK v. CLARK

The case of the *City of Highland Park v. Clark,* No. 41690 Michigan Supreme Court, is a mandamus action to compel the levy and spread of taxes to pay bonds issued for the construction of a project in a drainage district which is entirely foreign to the bonds, project and drainage district in this case. On the other hand, this is a class suit on behalf of bondholders to determine the validity and force the payment of bonds issued to pay for an entirely different project. In effect, petitioners are asking this Court to withhold action on the application for the writ of certiorari in this case for an indefinite period of time pending the decision of the Michigan Supreme Court in an entirely different type of action between different parties and involving a different subject matter.

We further wish to point out to this Court that the Michigan Supreme Court in the recent case of *Municipal Investors Association v. City of Birmingham,* 298 Mich. 314, decided June 30, 1941, has decided the same issues that are now raised in the Highland Park case adversely to the bondholders. In the City of Birmingham case bondholders of a paving assessment district sought a writ of mandamus in the Michigan Supreme Court to compel tax officials of the City of Birmingham to levy a reassessment of paving taxes against the property owners of the district in order to pay special assessment bonds. It appears from the record in that case that the great majority of the lots in the assessment district had been bid in by the State of Michigan because of delinquent taxes and that a large pro-

portion of the lots had been sold at Scavenger Sale under the terms of Act 155 of the Public Acts of Michigan of 1937, as amended. Section 9 of said Act provides:

> "Any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this Act free from any encumbrances. * * *"

The Michigan Supreme Court denied the writ of mandamus on the following grounds:

1. Because the City of Birmingham has no power or authority to levy a special assessment against the land while it is owned by the State of Michigan. This holding was based on the theory that a municipality which is a creature of the state cannot tax the state in the absence of legislation permitting such a tax. There is no such legislation permitting such a tax.

2. Because under the provisions of section 9 of Act 155 of the Public Acts of Michigan of 1937, quoted above, when the property was sold at "scavenger sale" the purchaser took title free and clear of any encumbrances or liens whatsoever. The Michigan Supreme Court further held that when purchasers take free and clear of all liens and assessments the municipalities cannot make a reassessment to pay for an old improvement. The court stated:

> "It should be borne in mind that when the lots in question were sold for delinquencies, upon failure to redeem, the title vested absolutely in the state, with power to dispose of them in any way not contrary to the constitution. Upon resale by the State Land Office Board, a new chain of title originated, evidenced by a quit claim deed, 'free of any encumbrances.' "

The same reasoning applied by the Michigan Supreme Court in the City of Birmingham case applies to the issues

raised in the City of Highland Park case and to the facts in this case because the bondholders here seek to compel the Board of Supervisors and the Drain Commissioner, who are respondents in this case, to levy and collect an assessment to pay for the project here under consideration. This Court will take judicial notice of the fact that in Michigan during the years of the depression subsequent to 1929 a very large proportion of taxable property became tax delinquent and was eventually bid in by the state and title became absolute in the State of Michigan. The records for the various municipalities in the Nine Mile-Halfway Drain District show that in excess of seventy percent (70%) of the property in the district was purchased at tax sales by the State of Michigan, and that the large majority of the said property was subsequently sold at "Scavenger Sale." The above figures are a matter of public record and can easily be verified by petitioners.

We respectfully submit, therefore, that this Court cannot give the bondholders the relief which they seek and still follow the local rule of law established by the Michigan Supreme Court decision in the City of Birmingham case which held that the tax officials cannot be forced to levy and collect taxes or special assessments when title to the great percentage of the property in the assessment district has become absolute in the state or has been purged of all liens and assessments by being sold at "Scavenger Sale."

It appears from the figures stated above as to the percentage of tax-delinquent properties that the taxpayers rather than the real estate operators and the bondholders were the parties most injured by the speculative activities which led to the construction of projects such as the one now before this Court.

Even if this Court were to disregard the law of the case, which this Court cannot do under the authorities, and con-

sider only the equities, it is to be noted that these projects were promotional schemes by real estate subdividers, eager bond salesmen and persons other than the county, the cities and the municipalities upon whom it is now sought to place the burden of paying for the same. We quote, in part, from the opinion of Judge Toms, the visiting Circuit Judge, who not only tried the case in the lower Michigan court but made a personal examination of the project:

> "The Nine Mile-Halfway Drain is not a drain as contemplated by law, but is in fact a *sewer,* the building of which in territories such as this can have no justification either legal or economic. * * *.
> *"The pouring of public money by the million in a district of this character for public improvements which would more than adequately serve an area with ten times the present population constitutes the grossest squandering of public funds which, if it is not, should be criminal."* (Emphasis supplied.)

In this case the judgment of the Circuit Court of Appeals was entered on March 14, 1941. The Petition for Rehearing was filed on April 9, 1941, and denied May 9, 1941. Soon after the date of denial of said Petition for Rehearing, to-wit, June 5, 1941, the Petition for the writ of mandamus was filed with the Michigan Supreme Court in the Highland Park case. An Answer was filed thereto on June 10, 1941, and on June 12, 1941, the Michigan Supreme Court entered its order to the defendants to show cause why the writ should not issue. The same parties who are the petitioners in this cause appear by the same counsel as relators in the mandamus proceedings in the Michigan Supreme Court. Thus petitioners after years of attempting to avoid the effect of the Michigan decision with reference to this project, and after having deliberately sought the jurisdiction of the Federal Courts, and after years of proceedings in these cases in the Federal Courts, are now seeking within

one month after the adverse decision in the Circuit Court of Appeals, to shift back to the Michigan courts. Since the Michigan Supreme Court has already ruled upon the invalidity of the very proceedings now before this Court and has enjoined the collection of taxes to pay for this project, we respectfully submit that this Court should not withhold its denial of the Writ of Certiorari in this case pending the decision of the Michigan Supreme Court in the City of Highland Park case.

CONCLUSION

The first reason advanced by petitioners for granting the writ of certiorari is based upon an alleged violation of the due process clause of the Federal Constitution by the decision of the Circuit Court of Appeals. We have shown that the decision which petitioners seek to review did not deprive petitioners of their rights to due process and that in reality all that petitioners are seeking is a rehearing of matters adjudicated by the court below. Petitioners admit that the second reason advanced is not a proper reason for the granting of the Writ because it deals only with the application of local law by the Federal Court. We have fully answered this second contention and shown substantial evidence to support the decision of the Circuit Court of Appeals. The third reason is based upon a claimed apparent conflict between the decisions of the Circuit Court of Appeals of the Sixth and Eighth Circuits and is not a proper reason because the Circuit Court of Appeals in this case did not make the decision that petitioners claim it did, and even if it be assumed that the court below made a decision in conflict with another Circuit the decision made was based on local law and is proper, because conflicts between Circuits are inevitable if the Fed-

eral Courts are to follow the law of the numerous states, and such conflicts are now permitted under the rule announced by this Court in *Ruhlin v. N. Y. Life Ins. Co., supra.*

It clearly appears from the records and the arguments of petitioners and respondents that petitioners have had their claims and rights finally adjudicated in both the federal and state court.

(a) The bondholders had their full day in court in these proceedings in which they were parties plaintiff, and the Special Master and the District Court made an independent finding of the illegality of the proceedings, which finding was concurred in by the Circuit Court of Appeals in its independent determination that "the proceedings are plainly null and void under Michigan law" and respondents are not estopped from denying the validity of the bonds. The judgment of the Circuit Court of Appeals, which conforms to the law of the state, finally determines the rights and claims of petitioners.

(b) The Circuit Court of Appeals in deciding the local issues properly found in substance that even if it had not made an independent determination of the illegality of the proceedings and the bonds under Michigan law, the bondholders had their day in court in the Township of Lake case where the state court found and decreed the entire proceedings illegal and void for want of jurisdiction in the Drain Commissioner to do what he attempted to do, because under the state and federal authorities cited the Drain Commissioner represented the bondholders in said state court proceedings.

Petitioners have either failed or refused to recognize that this Court in the Erie Railroad case overruled the doctrine of *Swift v. Tyson,* and we suggest that cases simi-

lar to the one at bar were the fundamental reason for the overruling of that doctrine.

The Circuit Court of Appeals in its well considered opinion clearly resolved purely local issues in favor of respondents.

We respectfully submit that there is no merit to petitioners' contentions and the writ sought should be denied.

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